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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Lisa L. Ocheltree, Plaintiff, vs. Scollon Productions, Inc. Defendant.	)	Civil Action No.: 3:96-1215-10 ORDER

This matter is before the Court upon Defendant's Motion To Amend Judgment And For Judgment As A Matter Of Law Or, As An Alternative To Judgment As A Matter Of Law, For New Trial, and upon Plaintiff's Motion For Award Of Attorney's Fees.

The Plaintiff initially filed this case asserting causes of action for sexual harassment, retaliation, and wrongful discharge. This court thereafter entered summary judgment against the Plaintiff upon the basis that the employer was

not aware of nor was it put on notice of the alleged sexual harassment. The Plaintiff appealed my ruling to the Fourth Circuit Court of Appeals. During the pendency of the appeal, the United States Supreme Court issued opinions in two sexual harassment cases, Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 Sup. Ct. 2257, 141 L. Ed. 2d 633 (1998) and Faragher v. Boca Raton, 524 U.S. 775, 118 Sup. Ct. 2275, 141 L. Ed. 2d 662 (1998). In these cases, the Supreme Court held that an employer may be subject to vicarious liability to a victimized employee for an actionable hostile environment "created by a supervisor with immediate (or successfully higher) authority over the employee," subject to an affirmative defense. The Supreme Court thus "rejected the rule...that an employer is liable only if it has notice of a supervisor's offensive behavior." Lissau v. Southern Food Service, Inc., 159 F. 3d 177, 181 (4th Cir. 1998).

In the present case, the Fourth Circuit Court of Appeals affirmed this Court's dismissal of the Plaintiff's wrongful discharge and retaliation claims, but vacated summary judgment on the sexual harassment claim and remanded "that issue for further proceedings in light of Ellerth and Faragher." See, Ocheltree v. Scollon Productions, 4th Circuit, No. 97-2506, August 11, 1998 (unpublished).

Upon remand, this case was tried before a jury on September 14, 20 and 21, 1999. The jury returned a verdict against the Defendant, Scollon Productions, Inc., and awarded the Plaintiff compensatory damages in the amount of $7,280.00, plus punitive damages in the amount of $400,000.00.

Initially, Defendant moves for judgment as a matter of law upon the grounds there is no evidence justifying an award of punitive damages. In Kolstad v. American Dental Association, 527 U.S. ____, 119 S. Ct. ____, 144 L. Ed. 2d 494 (1999), the Supreme Court affirmed two standards of liability for awarding compensatory and punitive damages in a Title XII employment discrimination case against a corporate employer. The Supreme Court, citing the statutory language of 42 U.S.C. §1981(a), held that a corporate employer could be liable for punitive damages where the Defendant has engaged in discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual.

The Fourth Circuit Court of Appeals has stated that in evaluating the sufficiency of evidence as to the malice or reckless indifference of employers, courts have typically focused on three types of evidence: (1) evidence of the

employer's attitude toward sexual harassment; (2) direct statements by the employer about Plaintiff's right or complaints; and (3) the egregiousness of the conduct at issue. Harris v. L & L Wings, Inc., 132 F. 3d 978, 983 (4th Cir. 1997).

The evidence presented at trial indicated the Defendant, Scollon Productions, Inc., had no formal or written policy concerning the issue of sexual harassment in the work place. Further, the evidence at trial indicated that Scollon Productions did not conduct any type of training, seminars, distribution of literature, or any other means of addressing sexual harassment with the employees nor did it otherwise have any policy discouraging sexual harassment or clearly stating that such conduct would not be tolerated in the employment work place. No evidence was presented by the Defendant indicating any proactive efforts on its part to prohibit sexual harassment in the work place and the jury could have therefore inferred the employer's attitude towards sexual harassment was one of indifference or little concern.

In addressing the second element to be reviewed by the Court in evaluating the evidence on malicious or reckless indifference of employers, testimony at trial

indicated the Plaintiff attempted on at least two occasions to complain to either Bill Scollen or Ellery Locklear, president and vice-president of Scollon Productions, Inc., respectively. Plaintiff testified that she had gone into the office of Mr. Scollon to complain about the work place conduct and that he directed her to Mr. Locklear because he did not have time to discuss the matter. Upon going to Mr. Locklear's office, Mr. Locklear was on a telephone call and Plaintiff testifies she wrote on a piece of paper that she needed to speak with Mr. Locklear as soon as possible about an important subject and placed it in front of him. Plaintiff was then instructed to return to work by her supervisor, Harold Hirsch, and Mr. Locklear testified that he never sought out Plaintiff or attempted to find her to discuss her concern or complaint. Furthermore, even Mr. Scollon admitted the Plaintiff had approached him one day in the work place and indicated she wanted to speak with him, but he had refused to talk to Plaintiff because of what he perceived as a recent policy violation concerning her use of the telephone. In fact, Scollon testified that he deemed whatever Plaintiff had to say to him at that time as "unimportant". Mr. Scollon also testified that he never further sought out Plaintiff again to inquire as to what she wanted to discuss or address her concern or any possible complaint.

Finally, Plaintiff offered testimony concerning the egregiousness of the conduct at issue. Plaintiff and other witnesses testified that vulgar profanity, sexual jokes, sexual remarks, and sexual innuendo were directed at the Plaintiff on a daily basis. The Plaintiff and two of her co-workers, Brian Hodge and Bill Killman, testified about not only the sexual jokes and sexual remarks made to Plaintiff, but also other lewd acts including male co-employees feigning sexual intercourse and oral sexual acts on a mannequin, showing Plaintiff pictures in a book of men's pierced genitalia, singing a lewd song to Plaintiff while standing directly in her face while co-employees and her supervisor laughed, and talked about performing sexual acts on women and young boys. Plaintiff and these two witnesses also testified that Plaintiff complained in a monthly safety meeting about the conduct and hostile work environment. Plaintiff's supervisor, Harold Hirsch, was in this meeting. Plaintiff and Brian Hodge testified that the conduct and sexual remarks only worsened after her complaint in the safety meeting. The Plaintiff and several other witnesses testified that Plaintiff's supervisor, Harold Hirsch, not only condoned this misconduct, but, in fact, was a participant himself in the activity and never made any efforts to discourage or prohibit such conduct.

Additionally, and perhaps more important, the jury was given a very detailed special interrogatory which accompanied the verdict form. The questions on the special interrogatory conformed with the jury charges presented by the Defendant. In addition to the instructions which were given to the jury concerning its deliberation on the elements of punitive damages, the special interrogatory required the jury to make a specific finding concerning the elements necessary to establish this claim, including a finding that the employer acted with malice or reckless indifference to the Plaintiff's federally protected rights. The jury found the Plaintiff proved this necessary element. Based upon the evidence presented at trial and the jury's specific findings, the Court finds the Defendant's motion for judgment as a matter of law on the grounds no evidence was presented justifying an award of punitive damages should be denied.

Defendant next moves for judgment as a matter of law on the grounds that Plaintiff did not establish the necessary elements for hostile work environment die to sexual harassment. To establish a claim of sexual harassment for an abusive work environment, either by co-workers or by a supervisor, Plaintiff must prove that: (1) the subject conduct was unwelcome; (2) it was based upon her sex; (3) it was sufficiently severe and pervasive to alter the

conditions of Plaintiff's employment and to create a hostile environment; and (4) it was imputable on some factual basis to the employer. Harris v. Forklift Systems, Inc., 501 U.S. 17 (1993): Spicer v. Comm. Of Va. Dept. of Corrections, 66F. 3d 705 (4th Cir. 1995) (en banc).

The Plaintiff testified, and the jury found, that the conduct complained of was unwelcome. At trial, the Defendant attempted to suggest to the jury that the conduct was not unwelcome because Plaintiff herself used vulgar language or profanity or made sexual remarks concerning her husband's genitalia. However, the jury specifically found on the special interrogatory that the conduct complained of was unwelcome and the Court finds there was sufficient evidence that a reasonable jury could reach this inference.

The jury also specifically found, as evidenced by its answer on the special interrogatory, the conduct complained of was specifically directed at Plaintiff because of her gender. As discussed herein, two witnesses testified the Plaintiff complained of inappropriate language and conduct in a monthly safety meeting and the conduct became more pervasive and severe after the Plaintiff's complaint. The Court therefore finds there was sufficient evidence

presented by Plaintiff such that a reasonable jury could reach this inference.

Defendant next contends the conduct complained of by Plaintiff was not sufficiently severe or pervasive to constitute harassment. As the Supreme Court set forth in Harris, factors relevant to the Court's inquiry concerning severity or pervasiveness include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with Plaintiff's work performance." Harris, 510 U.S. at 22. The Plaintiff, as well as other witnesses, testified about the inappropriate comments heard in the work place and the frequency of their occurrence. Plaintiff and other witnesses testified that terms such as "mother fucker", "faggot", "dick head", "pussy", "blow job" and "ass" were heard literally every day. Testimony was also presented concerning co-employees telling Plaintiff that their wives or girlfriends "liked to swallow" and that Plaintiff's supervisor indicated that he liked to have anal intercourse with young boys. The Court thus finds that sufficient evidence was presented that a reasonable jury could infer that the conduct complained of by the Plaintiff was sufficiently severe and pervasive to alter the conditions of her employment. In fact, one co-employee,

John Riddle, who was called as an adverse witness by the Plaintiff, admitted that the sexual comments and jokes which occurred at the work place affected his employment as well.

The Defendant also contends it is entitled to judgment as a matter of law because there was no evidence that Scollon management knew or should have know of the hostile work environment and failed to take reasonable steps to correct it. While the Plaintiff did, in fact, testify she never actually voiced her complaint of the hostile work environment to Bill Scollon or Ellery Locklear, the evidence showed the Plaintiff attempted to bring this matter to the attention of management and attempted to complain to them but to no avail. Additionally, it was undisputed that Plaintiff complained to her immediate supervisor, Harold Hirsch, about the improper conduct, including in the monthly safety meeting.

Plaintiff contended that management either directly knew, or should have known, of the hostile work environment. Harold Hirsch was the "shop supervisor" and was shown in an exhibit introduced at trial by Plaintiff as reporting directly to Vice-President Locklear. Mr. Hirsch was responsible for the shop technicians in the production

area, including Plaintiff and the shop technicians whom Plaintiff contends created the hostile work environment. Plaintiff presented testimony at trial that Hirsch also participated in the conduct which created the hostile work environment. Plaintiff's co-worker, John Riddle, testified that he did, in fact, complain about the sexual comments and jokes in the production area and testified that he also brought it to the attention of "Harold Hirsch or Ellery Locklear." There was therefore some evidence indicating that the hostile work environment was brought to the attention of management or that management, of which Harold Hirsch was a member, participated in the hostile work environment.

In Garber v. Saxon Business Products, Inc., 552 F. 2d 1032 (4th Cir. 1977), the Fourth Circuit recognized that "an employer policy or acquiescence in a practice" of sexual harassment can constitute a violation of Title VII. As the Court further stated in Katz v. Dole, 709 F. 2d 251 (4th Cir. 1983): "[W]hen such harassment pervades the work place, or is condoned or carried out by supervisory personnel, it becomes an illegal and discriminatory condition of employment that poisons the work environment." 709 F. 2d p. 254 ; see also 42 U.S.C. §2000(e)-2(a)(1).

Plaintiff presented evidence that the harassment at Scollon Productions was both condoned and carried out by supervisory personnel. Additionally, the special interrogatory specifically asked the jury if it found by a preponderance of the evidence that the management of Scollon Productions, Inc., either knew or should have known of those actions and failed to take reasonable steps to stop them, to which the jury responded in the affirmative. The Court finds that Plaintiff presented sufficient evidence such that a reasonable jury could infer that Scollon knew or should have known of the harassment and failed to stop it.

Finally, Defendant contends that it is entitled to judgment as a matter of law because no evidence was presented that Harold Hirsch's employment relation to Plaintiff constituted a continuing threat to the conditions of her employment that made her vulnerable to and defenseless against his actions. Plaintiff presented testimony that Harold Hirsch approved, at least initially, all requests for vacation and leave time. Evidence was also presented that Harold Hirsch controlled certain aspects of Plaintiff's employment, including assignment of work, approval of work, approval of the quality of work, as well as control of break times. Evidence was presented by Plaintiff of Hirsch's testimony at a hearing before the South Carolina

Employment Security Commission wherein Hirsch referred to "my" department and certain actions which were detrimental to "my" authority. Again, the jury specifically responded affirmatively to the questions on the special interrogatory which asked whether Mr. Hirsch had the power to hire, fire, demote, promote, transfer or discipline Ms. Ocheltree or otherwise affect the conditions of her employment and that Mr. Hirsch's employment relation to Ms. Ocheltree as her supervisor constituted a continuing threat to her employment condition that made her vulnerable to and defenseless against these actions in way that comparable conduct by a mere co-worker would not. The Court therefore finds there was sufficient evidence such that a reasonable jury could reach this inference and denies this basis for Defendant's motion.

For the foregoing reasons, Defendant's motions for judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure is hereby denied.

Defendant also moves for a new trial under Rule 59 of the Federal Rules of Civil Procedure. Essentially, Defendant reasserts each of the reasons and bases for a new trial upon which it sought judgment as a matter of law. Accordingly, for the same reasons set forth hereinabove,

Defendant's motion for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure is denied.

Defendant also moves to amend the judgment. 29 U.S.C. §1981 (a)(b)(3) provides a maximum recovery to Plaintiff for compensatory and punitive damages in Title VII cases of $50,000.00 when the Defendant employs fewer than 101 employees. Since the evidence presented at trial showed the Defendant employed 51 people, based upon the clear language of the statute, the Defendant's motion to amend the judgment is hereby granted pursuant to Rule 59(e) of the Federal Rules of Civil Procedure and the judgment is amended so as to reduce the punitive damages from $400,000.00 to $42,720.00, providing for a total judgment in the amount of $50,000.00 in favor or the Plaintiff against the Defendant, Scollon Productions, Inc.

Plaintiff has filed a motion requesting an award of attorney's fees and costs. Plaintiff has submitted an itemized statement by her attorneys reflecting time and services spent in this case. These time sheets reflect that William E. Hopkins, Jr. of McCutchen, Blanton, Rhodes & Johnson, L.L.P. expended 136.25 hours toward this matter and the firm expended $2,206.95 in costs and expenses. Wesley Locklair, Esquire of Chapman and Locklair, P.A.

also submitted a time sheet showing 53.1 hours expended on behalf of Plaintiff. Plaintiff's counsel are seeking fees based upon the time spent on this case at an hourly rate of $175.00 per hour for William E. Hopkins, Jr. and $125.00 per hour for Wesley Locklair. Mr. Hopkins is a partner with the law firm of McCutchen, Blanton, Rhodes & Johnson, L.L.P. and Mr. Locklair is an associate with Chapman & Locklear, P.A. Affidavits have been submitted by Mr. Hopkins, as well as Malissa Burnette, Esquire and Herbert Louthian, Esquire. Based upon these affidavits, as well as the factors set forth and enunciated by the Fourth Circuit in Barbar v. Kimbrall's, Inc., 577 F. 2d 216, 226 (4th Cir. 1978), and again set forth in Allen v. Burke, 690 F. 2d 376 (4th Cir. 1982), the Court finds the fees requested to be reasonable. Therefore, the Court hereby awards Plaintiff's counsel fees as follow: 136.25 hours expended William E. Hopkins, Jr. at the rate of $175.00 for a total of $23,843.75 plus $2,206.95 in costs and expenses expended by the firm of McCutchen, Blanton, Rhodes & Johnson, L.L.P., plus 53.1 hours for Wesley Locklair at an hourly rate of $125.00 for a total of $6,637.50, for a total award of $32,688.20.

Now therefore, IT IS HEREBY ORDERED:

1. The Defendant's Motion for Judgment As A Matter Of Law Or, As An Alternative To

Judgment As A Matter Of Law, For New Trial is denied.

2. The Defendant's Motion to Amend Judgment is granted, thereby reducing the judgment to $7,280.00 actual damages and $42,720.00 punitive damages.

3. The Plaintiff's Motion for an Award of Attorney's Fees is granted in the amount of $23,843.75 to William E. Hopkins, Jr., plus reimbursement of expenses of $2,206.95, and $6,637.50 to Wesley Locklair. The Clerk of Court is instructed to further amend the judgment against the Defendant in the amount of $32,688.20.

AND IT IS SO ORDERED.

The Honorable Matthew J. Perry, Jr.
Senior Judge, United States District Court
Columbia, South Carolina

April 13, 2001